James Heavy Equipment Specialists, Inc. *and* International Union of Operating Engineers, Local No. 9. Cases 27–CA–15017 and 27–CA–15117

March 19, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On July 23, 1997, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders the Respondent, James Heavy Equipment Specialists, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall take the actions set forth in the Order as modified.

1. Substitute the following for paragraph 2(j).

"(j) Pay to the appropriate contract benefit funds the contributions required to the extent that such contributions have not been made and continue such payments until Respondent negotiates in good faith with the Union to an agreement, or to good-faith impasse, or until the Union refuses to bargain."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT withdraw recognition from, or refuse to bargain with, the International Union of Operating

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that the judge, in finding that the Respondent violated Sec. 8(a)(1) of the Act by instigating employee Dennis Bensavage's antiunion petition and by awarding him bonus pay and offering to purchase equipment from him as considerations for his circulating the petition, relied in part on hearsay testimony. However, we also note that the Respondent did not object to this testimony at the hearing, and that no party excepts, on hearsay grounds, to the judge's reliance on this testimony.

Member Hurtgen notes that, as to the violations found by the judge involving the activities of Caroline Hake and Charles Zeitz, the Respondent's exceptions raise only the issue of agency. Member Hurtgen agrees with the judge that Hake and Zeitz acted as the Respondent's agents, and he would therefore adopt pro forma the judge's findings that their conduct was unlawful.

Member Hurtgen also notes that the Respondent excepts to the requirement in the judge's remedy that it remit all fringe benefit amounts which have become due since October 31, 1997, and any additional amounts. The Respondent argues that since about January 1, 1997, it has paid premiums for coverage of all of its employees under benefit plans sponsored by the Respondent, and that its employees have not suffered any loss of benefits. Member Hurtgen would allow the Respondent to make this "windfall" argument at the compliance stage of this proceeding with respect to the Union's health plan but not with respect to the Union's pension plan. As to the health plan, Member Hurtgen would leave to compliance the details of the Respondent's contribution requirement, if any. But he would hold that, if the Respondent has provided comparable health benefits, it would at most be obligated to make payments to the Union's plan reflecting that plan's fixed expenses shown to be necessary for its administration. There is no showing that, during the period of the violation, the health plan was required to cover the employees involved herein, Indeed, it is undisputed that these employees were covered by a plan of Respondent. If Respondent can show, in compliance, that its plan was comparable to the Union's plan, there would have been no need to cover them under the Union's plan. In that event, once the fixed costs are reimbursed, it would appear that the health plan fund would be as viable as it was before the violation, and the fund will be able "to provide for future needs" of the employees. See *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983).

[2] Respondent withdrew recognition from the Union on December 16, 1996. There are no exceptions to the conclusion that this conduct violated Sec. 8(a)(5). However, the Respondent excepts to the judge's imposing a bargaining order. For the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), we do not find merit in this exception. We note that the employee petition of February 7 was engendered by the Respondent, and there is no evidence that the decline in union support among employees resulted from anything other than the Repondent's unlawful conduct as found by the judge. Thus, that tainted expression of employee disaffection cannot be a basis for a denial of a bargaining order.

In an erratum dated August 1, 1997, the judge added a par. 2(j) to his Order, relating to payments by the Respondent to contract benefit funds. In this paragraph, he included a proviso pertaining to whether employees had otherwise been made whole for their expenses. We find such a proviso inappropriate in this remedial context, and we have therefore deleted it. See *Stone Board Yard v. NLRB,* supra (Board properly required payment of past due contributions to union benefit funds even if the employer's substitute plans met the present needs of the employees; "the diversion of contributions from the union funds undercut[s] the ability of those funds to provide for future needs").

Engineers, Local No. 9 as the exclusive bargaining representative of our employees in the following appropriate bargaining unit:

> All full-time and regular part-time maintenance, service and parts employees employed by us at our 2150A South Valencia Street, Denver, Colorado, location, excluding all other employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change your wages, hour,s or working conditions and WE WILL NOT bypass the Union and deal directly with you on such matters.

WE WILL NOT stop paying your employee benefit funds as required by the expired collective-bargaining contract with the Union.

WE WILL NOT constructively discharge Michael Cardenas because he supports the Union.

WE WILL NOT coercively question you about your union sympathies or your opinions of our proposed benefit plans.

WE WILL NOT threaten you that the Respondent will cease business because the Union represents you.

WE WILL NOT threaten you that we will no longer recognize the Union as your collective bargaining representative and that you will receive only the benefits that we determine.

WE WILL NOT coercively accost union representatives.

WE WILL NOT sponsor, initiate, or pay for efforts to get employees to renounce the Union as their collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, notify the Union in writing that: (1) we now rescind our December 16, 1996, withdrawal of recognition from the Union, (2) we now recognize the Union as the exclusive collective-bargaining representative of our unit employees, and (3) at the Union's request, we will rescind all or any part of the unilateral changes we made to our unit employees' terms and conditions of employment.

WE WILL, on request, bargain with International Union of Operating Engineers, Local No. 9 as the exclusive representative of the employees in the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL within 14 days from the date of the Board's Order, offer Michael Cardenas full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Michael Cardenas whole for any loss of earnings and other benefits resulting from his constructive discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful constructive discharge of Michael Cardenas, and WE WILL**,** within 3 days thereafter, notify him in writing that this has been done and that his constructive discharge will not be used against him in any way.

WE WILL, at the Union's request, rescind all or any part of the changes we unilaterally implemented to the employees terms and conditions of employment, and WE WILL make our unit employees whole, with interest, for any losses they may have incurred as the result of our unilateral implementation of terms and conditions of employment.

WE WILL pay to the appropriate contract benefit funds the contributions required to the extent that such contributions have not been made and continue such payments until we negotiates in good faith with the Union to an agreement, or to good-faith impasse, or until the Union refuses to bargain.

JAMES HEAVY EQUIPMENT SPECIALISTS, INC.

A. E. Ruibal, Esq. and *Cynthia Blasingame, Esq*., for the General Counsel.
Timothy J. Parsons, Esq., for the Respondent.
J. William McCahill, Esq., for the Charging Party.

DECISION

ALBERT A. METZ, Administrative Law Judge. This case was heard at Denver, Colorado, on May 5–6, 1997.[1] The International Union of Operating Engineers, Local No. 9 (the Union) has charged that James Heavy Equipment Specialists, Inc. (Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Respondent operates a construction equipment and vehicle repair service in Denver, Colorado. The Respondent and the Union have a collective-bargaining relationship dating from 1990. Their most recent collective-bargaining agreement was effective from November 1, 1993, to October 31, 1996.[2] That

[1] All dates refer to the time period September 1996 through February 1997 unless otherwise stated.

[2] The unit covered by the contract is:

contract provided for Respondent's payments to various benefit funds including medical and pension plans.

III. INITIAL BARGAINING

Starting in October 1996 the Respondent and the Union had four meetings to discuss a new collective-bargaining contract. Fred M. James, Respondent's president, and Jerry E. Dout, the Union's business manager, were the sole negotiators. At the first meeting held October 21 James said he needed to be competitive and wanted a change from the existing contractual benefit funds. James said he had been investigating a Kaiser health fund and a 401(k) retirement fund administered by Principal Financial Group. The only information James gave to Dout about the plans was a spreadsheet showing a comparative cost analysis that had been prepared by a benefit consultant. Dout asked for a detailed description of the plans but none was ever supplied to the Union.

Employee James Heylmann testified that in mid-October he received a copy of the benefit comparative cost spreadsheet in his pay envelope. The Government alleges that this act by the Respondent was unlawful direct dealing with employees. Specifically it is alleged that the Respondent "was proposing different employee benefit plans prior to proposing those plans to the Union." It has not been shown that Heylmann was given the spreadsheet prior to its presentation to the Union. I find that the Government has failed to prove by a preponderance of the evidence that Respondent violated Section 8(a)(1) and (5) of the Act by giving, without comment, the same document to Heylmann that it had provided the Union.

A second bargaining meeting was held on October 30. Again a central topic of discussion concerned the Respondent's proposed benefit plans. Dout noted that the one-page spreadsheet was inadequate to use as a comparison with the existing plans. Dout also wanted to know what would happen to the $1.60-per-hour contribution currently being paid to the employees' plans that would be saved under the Respondent's proposal. James stated he had recently lost $43,000 in the business, he had to be competitive and he thought the employees should share his losses. Dout offered to create a proposal that would provide the Respondent with some relief as to the rates paid "new-start" mechanics.

IV. RESPONDENT DISCUSS NEW BENEFIT PLANS WITH EMPLOYEES

On October 31 the Respondent posted a notice at its facility telling employees that meetings would be held on November 1 and 4. The meetings were to be conducted by a benefits consultant and would discuss the Kaiser medical plan and the 401(k) pension plan. The Union was not notified of these meetings. At both meetings James and plan representatives discussed the advantages of these plans. James was asked at one of the meetings when the plans would go into effect. He told the employees they would be implemented on January 1, 1997. James also stated that if he was to stay with the Union for another year he would probably be out of business.

The Respondent's attempt to sell its benefit proposals to the employees was direct dealing. The employees were told the benefit plans would go into effect on January 1. The Union was never told the Respondent was meeting with the employees. I find that the Respondent did deal directly with its employees when it announced the meetings, met and gave employees detailed information about such plans without first discussing the matter with the Union. Additionally, James told the employees the plans would go into effect on January 1. I find that such conduct violates Section 8(a)(1) and (5) of the Act. I further find that James' threat that he would probably be out of business in a year if he continued to deal with the Union was a violation of Section 8(a)(1) of the Act.

V. JAMES' DISCUSSIONS WITH HEYLMANN

Following the early November meetings mechanic James Heylmann voiced his opposition to fellow employees about the Respondent's benefit plans. On November 13 James sought out Heylmann and angrily told him that he was not going to profit from having the new benefit plans. James complained that the Respondent had lost $40,000 in the previous quarter and he would not be in business in a year if he did not start making some money. Heylmann asked James what was going to happen to the $1.60 that was presently being contributed towards the employees' benefit plans. James had no answer for Heylmann's question. James said he was a strong union man and he was not trying to get rid of the Union. I find that James' angry threat that the Respondent would be out of business was unlawful and made in an effort to coerce employees into accepting his benefit plans proposal. I find that the threat is a violation of Section 8(a)(1) of the Act.

VI. FINAL NEGOTIATIONS

A third negotiation session was held on November 15. At this meeting James protested that he was paying too much for benefits under the existing contractual benefit plans. He was concerned that he was not competitive with other area union companies. Dout offered a 3-year contract that included a freeze in wages for the first year, and many other concessions. James ultimately agreed to the proposal and Dout said he would prepare the contract with the changes and fax a copy to James for his approval. Dout then returned to his office, drafted the contract, and faxed it to James.

On November 18 Dout received a fax from James stating that he wanted to hold off any discussions with the employees of the contract draft until James returned from out of town. James said, "On reviewing our discussion and tentative agreement I wish a change in some areas of which we will discuss on my return." In a reply letter dated November 22, Dout said he was prepared to resume discussions with James on his desired changes at his earliest convenience.

In late November James conducted another employee meeting to discuss the Kaiser medical and 401(k) retirement benefit plans. The advantages of the plans were emphasized to the employees. Again the Union was not informed of these discussions with the employees or given details of the plans. I find that this meeting was direct dealing with employees in violation of Section 8(a)(1) and (5) of the Act.

On December 6 Dout and James met for their final negotiation meeting. James stated that he had assessed their tentative agreement and the Respondent's financial condition. He told Dout that he could not acquiesce in their tentative agreement. James said he was not sure that he was going to be in business within a year and thus he was proposing a 1-year extension of the existing contract. Dout said he was not sure the employees would accept such a proposal but agreed to present the matter

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All full-time and regular part-time maintenance, service and parts employees employed by the Respondent at its 2150A South Valencia Street, Denver, Colorado, location, excluding all other employees, professional employees, guards and supervisors as defined in the Act.

to them. On December 9 Dout sent James a letter confirming that the Union would present the Respondent's 1-year extension proposal to the employees for a vote on December 13.

VII. THE EMPLOYEES' VOTE ON RESPONDENT'S CONTRACT PROPOSAL

On Friday evening, December 13, Dout met with the unit employees at the Respondent's shop and told them of the contract proposal. The employees voted against accepting the 1-year extension. Dout concluded the meeting by telling the employees that he would contact James and resume bargaining.

VIII. RESPONDENT WITHDRAWS RECOGNITION FROM THE UNION

On Monday morning, December 16, Dout called the Respondent's office and asked to speak to James. He was not able to talk to James but learned from the office manager and James son, Jeff, that James had held an employee meeting that morning. In the meeting James had told the employees that he was implementing the benefit plans he had been discussing with them. Dout finally was able to talk to James that morning and explained to him the employees had rejected his 1-year extension proposal. Dout said he wanted to meet again and bargain further. James told Dout, "I am open shop . . . and this is my damned business; I can run it the way I want." Dout said that James should seek legal advice and that what he was instituting as a benefit package had not been agreed to by the Union. James retorted, "It's my god-damned business; I'll run her as I see fit; I am open shop; I am non-union."

The Respondent relies on the employees' vote against the contract extension as a referendum rejecting further union representation and justifying its withdrawal of recognition of the Union. James withdrawal of recognition can at best be described as wishful thinking. Dout's December 9 letter to James made clear that the only issue the employees would be voting on was Respondent's offer to extend the contract for 1 year. The employees voted only on this single question. After the vote Dout told the employees he would immediately contact James to continue bargaining. In sum, nothing that was said or done in connection with the vote suggested that the employees no longer desired to be represented by the Union. James seized on the vote as an excuse to rid himself of the Union. I find on December 16 the Respondent did not have a reasonably based doubt that the Union no longer represented a majority of the unit employees. I further find that the Respondent violated Section 8(a)(1) and (5) of the Act when it withdrew recognition from the Union, refused to meet with the Union and told the employees it was implementing its own benefit plans. *L & L Wine & Liquor Corp.*, 323 NLRB 848 (1997); *T.L.C. St. Petersburg*, 307 NLRB 605 (1992).

IX. THE UNION'S DECEMBER 16 MEETING WITH EMPLOYEES

Dout conferred with the Union's legal counsel, J. William McCahill. They decided that a fax would be sent to James in an attempt to continue bargaining. Dout's fax to James stated in part, "I am requesting a meeting to continue discussions for a replacement collective bargaining agreement. I believe that we can resolve the issues which caused the company proposal to be rejected." Dout sent the fax and then called James. James again stated he was now a nonunion, open shop, and he was not interested in bargaining with Dout. Dout asked James to permit him a meeting with the employees at the shop to inform them of what had taken place. James agreed.

At noon on December 16 Dout, McCahill, and Union Business Agent Jerry Smart went to the Respondent's offices and met with the unit employees. James was also present and told the employees that the Union no longer represented them. James at one point noticed Union Attorney McCahill. He aggressively approached McCahill and stood closely to him. James then yelled in McCahill's face, "You're a fucking asshole attorney." McCahill, who is much smaller physically than James retreated. James said, "Do I scare you?" McCahill said he was just doing his job. At this point Respondent's corporate attorney, Charles Zeitz, restrained James and moved him away from McCahill. Unit employees witnessed James' actions towards McCahill. Dout addressed the employees telling them that the Respondent was claiming to be a nonunion operation and had rejected the Union's request to continue bargaining. Dout said the Union would be filing unfair labor practice charges against the Respondent. I find that James' coercive action toward McCahill in the presence of unit employees was a violation of Section 8(a)(1) of the Act. *Horton Automatics*, 289 NLRB 405, 410–411 (1988). I further find that James' remark that the Union no longer represented the employees was an unlawful threat in violation of Section 8(a)(1) of the Act.

X. QUESTIONING OF EMPLOYEE CARDENAS

Later in the day of December 16, employee, Michael Cardenas, was approached by Respondent's office manager, Caroline Hake, and asked if he intended to participate in the new Kaiser medical plan. Cardenas said that he would not sign up for the Kaiser plan. The Government alleges that Caroline Hake was acting as the Respondent's agent when she asked Cardenas if he was agreeing to accept the new benefits and that this is an unlawful interrogation. Hake is the Respondent's office manager and part of her job was to coordinate the Respondent's participation in the various benefit plans. Hake testified the Respondent was trying to get everyone signed up in the new benefit plans by January 1, 1997. I find that Hake was acting as the Respondent's agent when she questioned Cardenas as to his participation in the unlawfully implemented benefit plans. Under all the circumstances, her interrogation of Cardenas was a coercive effort to learn if he would support the Respondent's unlawful implementation of the new benefit plans. I find that such action by Respondent's agent was a violation of Section 8(a)(1) of the Act. *Medical Center v. NLRB*, 723 F.2d 1468, 1475 (10th Cir. 1983).

Shortly after Cardenas spoke to Hake he was approached by James and questioned why he did not want to sign up for the 401(k) and Kaiser plans. Cardenas told James that he thought the Union's plan was better. I find James' interrogation of Cardenas as to why he did not want to join the Respondent's unlawfully implemented benefit plans was coercive and a violation of Section 8(a)(1) of the Act. *Medical Center v. NLRB,* supra.

XI. JAMES' DECEMBER 17 EMPLOYEE MEETING

On December 17 James held an employee meeting and again told the workers the new benefit plans would be going into effect on January 1. He also said that if any of the employees wanted to quit he would not hold it against them. On the same date James distributed a memo to the employees regarding the Respondent's position on the Union and employee benefits. The memo reads in pertinent part:

> The results of the election regarding the union is [sic] complete. The union is no longer associated with James Heavy Equipment Specialists, Inc. The company looks forward to a healthy and prosperous relationship with you, its employees.
>
> Our discussions on previous occasions indicated you would have new health and pension benefits. You do. As of January 1, 1997, you will have health benefits through Kaiser Permanete and have received a brochure describing the benefits. We are expecting soon and will distribute a brochure from the Principal Financial Group, the 401 pension plan trustee. These benefits will also begin January 1, 1997. At the present time wages will remain at the prevote level. [G.C. Exh. 12.][3]

When parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole. *NLRB v. Katz*, 369 U.S. 736 (1962); *Bottom Line Enterprises*, 302 NLRB 373 (1991). It is settled law that an employer violates its duty to bargain when it institutes changes in employment conditions without first consulting with the employees' collective-bargaining representative. *McDaniel Ford, Inc.*, 322 NLRB (1997). Here the Respondent implemented its own benefit programs without notice to, or good-faith bargaining with, the Union. I have already found the Respondent unlawfully withdrew recognition from the Union.

The Respondent asserts as an alternative defense that because negotiations were at an impasse it was free to implement changes. Respondent's impasse defense is frivolous. Dout sought to continue bargaining, even in the face of the Respondent's unlawful actions of direct dealing with employees and repudiating the Union's representative status. These unfair labor practices were unremedied at the time the Respondent asserts the impasse occurred. Additionally, even assuming there was an impasse, the Respondent ignored its legal significance. It is axiomatic that if an impasse occurs after good-faith bargaining the employer is permitted to implement its last offer. *Taft Broadcasting Co.*, 163 NLRB 475 (1967). The Respondent did no such thing in this case but rather put into effect terms and conditions of employment that were not in its last offer. That offer was for a 1-year extension of the existing contract and did not mention changing benefit plans. What the Respondent unilaterally implemented had nothing to do with its last offer. The Respondent's impasse defense is without merit. I find that the Respondent violated Section 8(a)(1) and (5) of the Act when it unilaterally implemented its own benefit programs. *Gondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 886 (D.C. Cir. 1997); *T.L.C. St. Petersburg*, 307 NLRB 605 (1992). I further find that on December 17 the Respondent made unlawful threats to unit employees that the Union no longer represented them and they would be receiving unilaterally imposed benefits. I find that this conduct was a violation of Section 8(a)(1) of the Act.

[3] On January 1, 1997, the Respondent unilaterally implemented its benefit plans as announced.

XII. ZEITZ' QUESTIONING OF CARDENAS

On December 17 Respondent's attorney, Zeitz, asked Cardenas about his opinion of the Kaiser and 401(k) plans. Cardenas told him that he felt the union benefit plans were best for himself and he had too much to lose by not being covered by the union plans. The Government alleges that Zeitz is Respondent's agent and that his asking Cardenas his opinion of the Respondent's new benefit plans is an act of unlawful interrogation. Zeitz was equivocal when he testified as to whether James had asked him to interrogate employees about the subject. He testified: "I don't know—I can't really answer that. I know that both of us—I had the concern and he had the concern, and we talked, and if he didn't instruct me, he didn't tell me not to." I find that Zeitz was the Respondent's agent when he questioned Cardenas about his intentions towards the Respondent's unlawfully implemented benefit plans. Under all the circumstances I find that Zeitz' questioning of Cardenas was unlawful interrogation and direct dealing in violation of Section 8(a)(1) and (5) of the Act.

XIII. CONTRACT FUND CONTRIBUTIONS

Starting in December the Respondent ceased paying contributions to the union benefit funds.[4] The Respondent returned a delinquency notice from the trust funds with a note that, "As of 10/96 we are no longer under union contract." (G.C. Exh. 14.) I find that the Respondent was not privileged to stop paying the contractual benefit funds. An employer is required to continue benefit payments under an expired contract until such time as a new agreement is reached, a good-faith impasse in bargaining has occurred or the union waives its right to bargain. *Stone Boat Yard*, 264 NLRB 981–982 (1983). None of these events occurred in this case. I find that the Respondent's cessation of contractual benefit payments was a violation of Section 8(a)(1) and (5) of the Act.

XIV. RESIGNATION OF MICHAEL CARDENAS

On December 20 Michael Cardenas gave the Respondent 2 weeks' notice that he was quitting his employment. Cardenas then terminated his employment as planned. He testified that his quitting was motivated by the Respondent's rejection of the Union and the implementation of the new benefit funds which were detrimental to his union pension. Respondent unsuccessfully attempted to persuade Cardenas to stay employed with the Respondent. Cardenas told Supervisor Fred D. James (son of the Respondent's president, Fred M. James) that he was resigning. Fred D. asked Cardenas if his resignation was because of the Union and Cardenas said it was. The Government alleges that Fred D's question was an unlawful interrogation. Under all the circumstances, I find that such a question was not threatening or coercive. I find that the Respondent did not violate Section 8(a)(1) of the Act by such action.

The Government alleges that when Cardenas quit his employment because of the Respondent's unlawful actions concerning collective bargaining, he was constructively discharged. The Respondent argues that Cardenas' termination was simply his free will decision to quit employment.

[4] These funds include (1) Operating Engineers Health and Welfare Trust Fund of Colorado; (2) Central Pension Fund of the International Union of Operating Engineers and Participating Employers; (3) Colorado Journeyman Apprentice Training for Operating Engineers; and (4) Colorado Operating Engineers Vacation Fund.

In *Goodless Electric Co.*, 321 NLRB 64, 67–68 (1996), the Board reiterated the standard for constructive discharges which arise in the context of an employer's unlawful actions concerning collective bargaining:

> Employees who quit work as a consequence of an employer's unlawful withdrawal of recognition from their collective-bargaining representative and unilateral implementation of changes in their terms and conditions of employment have been constructively discharged in violation of Section 8(a)(3) and (1). *White-Evans Co.*, 285 NLRB 80, 81 (1987); *Superior Sprinkler, Inc.,* 227 NLRB 204 (1976). The theory of this violation is that employees have the statutory right to union representation as well as the contractual benefits negotiated by their representative. They may not be forced to make the Hobson's choice of leaving their jobs or forfeiting their statutory rights in order to remain employed under the working conditions unlawfully set by their employer. *Noel Corp.,* 315 NLRB 905, 909 (1994); *RCR Sportswear, Inc.,* 312 NLRB 513 (1993).

Cardenas quit his employment as a result of the Respondent's unlawful actions and particularly because of the adverse effect they had on his union pension. I find that Cardenas was constructively discharged and that the Respondent thus violated Section 8(a)(1) and (3) of the Act. *NLRB v. Tricor Products, Inc.,* 636 F.2d 266, 271 (10th Cir. 1970).

XV. BONUS PROGAM

On December 27 James held another employee meeting where he discussed the Respondent's plans for the future. He told the employees that he was instituting a bonus plan but did not give details of how the plan would be applied. Subsequently certain employees were paid bonuses. I find that the Respondent's announcement of the bonus program was direct dealing with the employees in violation of Section 8(a)(1) and (5) of the Act.

XVI. ANTIUNION STATEMENT FORMS

On about February 12 the Respondent placed blank forms in the Respondent's lunch area. These documents were statements that were to be filled in by employees and expressed their withdrawal of support for the Union. In sum, the forms state that the employee had discussed his dissatisfaction with the Union with James, that the vote rejecting the 1-year contract extension was intended to terminate the Union's representation rights, and concluding that the signer no longer wanted the Union to represent them. The statements had been prepared using language drafted by the Respondent's lawyers. There was no showing that the statements were prepared in response to specific employee requests.

In *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985) the Board set forth the following standard concerning an employer's involvement with decertification petitions:

> [I]t is unlawful for an employer to initiate a decertification petition, solicit signatures for the petition, or lend more than minimal support and approval to the securing of signatures and the filing of the petition. In addition, while an employer does not violate the Act by rendering what has been termed "ministerial aid," its actions must occur in a situational context free of coercive conduct. "In short, the essential inquiry is whether the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned."

Against the background of the Respondent's unfair labor practices it is apparent that the antiunion statements were offered to the employees in order to buttress the Respondent's efforts to rid itself of the Union. By gratuitously preparing the statements and making them available to its employees the Respondent was unlawfully attempting to further its campaign to undermine the Union's representative status. I find that such action was a violation of Section 8(a)(1) of the Act.

XVII. CIRCULATION OF ANTIUNION PETITION

On February 7, 1997, employee Dennis Bensavage circulated an antiunion petition among the unit employees which stated the signers no longer wanted to be represented by the Union. The Government alleges that Bensavage's efforts were a quid pro quo for the Respondent's purchase of some service equipment that he was attempting to sell the Company. The Government also argues that Bensavage was paid a bonus for his antiunion efforts. The Respondent denies it had anything to do with Bensavage's petition.

Bensavage had worked in Pennsylvania before his employment with the Respondent and he owned a large amount of service equipment that was compatible with the Respondent's operations. That equipment was stored in Pennsylvania. Bensavage offered to sell the equipment to James shortly after he started employment with the Respondent in July 1996. James expressed an interest in the machinery but the sale has not yet taken place. Bensavage confirmed that he had been told by James subsequent to the Respondent renouncing the Union that he would be receiving a bonus for certain work in the future. He also had recently received a promotion to a foreman position.

On February 7 Bensavage circulated the antiunion petition among the employees and solicited their signatures. He later sent the petition to the NLRB. Employee James Heylmann testified that on February 12 he had a conversation with Bensavage about the petition. Bensavage said James had wanted to buy his machine shop equipment but said that if "the deal didn't go through with the union, that he wouldn't be able to buy that machine shop equipment." Heylmann recalled that he also talked later that day to Bensavage. They agreed that Bensavage was caught between the NLRB and James. Heylmann told Bensavage that he should tell the truth to the NLRB. Heylmann recalled that Bensavage told him that: "[I]f anybody important found out about this, what was happening, that Fred would fire him, and at that time, Dennis needed to sell his machine shop equipment . . . . He said that . . . Fred had told him if he could make this deal work, that he'd get a bonus." Bensavage could not recall any such conversations with Heylmann. James denied that he had anything to do with Bensavage's antiunion petition.

Considering the demeanor of the witnesses I credit Heylmann's version of events. I find that the Respondent instigated Bensavage's antiunion petition and that he was acting as the Respondent's agent in circulating that petition. Respondent's sponsorship of the petition is a violation of Section 8(a)(1) of the Act. *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985). I further find that the Respondent's awarding of bonus pay to Bensavage and its offer to purchase his equipment were considerations for circulating the antiunion petition and were unlawful coercion in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, James Heavy Equipment Specialists, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, International Union of Operating Engineers, Local No. 9, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the Section 9(a) representative of the Respondent's employees in the following unit:

> All full-time and regular part-time maintenance, service and parts employees employed by the Respondent at its 2150A South Valentia Street, Denver, Colorado, location, excluding all other employees, professional employees, guards and supervisors as defined in the Act.

4. Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Interrogating employees about their union sympathies and opinions of Respondent's proposed benefit plans.

(b) Threatening employees that the Respondent would cease business because of their union representation.

(c) Threatening employees that the Respondent no longer recognized the Union as their collective-bargaining representative and that they would only receive benefits determined by the Respondent.

(d) Coercively accosting union representatives in the presence of employees.

(e) Sponsoring, initiating and paying for efforts to get employees to renounce the Union as their collective-bargaining representative.

5. Respondent violated Section 8(a) (1) and (3) of the Act by constructively discharging Michael Cardenas.

6. Respondent violated Section 8(a) (1) and (5) of the Act by:

(a) Bypassing the Union and dealing directly with employees.

(b) Unilaterally implementing changes in terms and conditions of employment of employees.

(c) Withdrawing recognition from, and refusing to meet and bargain with, the Union.

(d) Ceasing to pay employee benefit funds as required by the expired collective-bargaining contract with the Union.

7. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. Respondent has not violated the Act except as herein specified.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having constructively discharged Michael Cardenas it must offer him reinstatement to his former position, without prejudice to his seniority or other rights and privileges or, if any such position does not exist, to a substantially equivalent position, dismissing if necessary any employee hired to fill the position, and to make him whole for any loss of earnings and other benefits he may have suffered, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall expunge from its records all references to the unlawful constructive discharge of Michael Cardenas and notify him in writing that this has been done, and that Respondent will not rely on the constructive discharge as a basis for future discipline of him.

Having found that the Respondent, is in violation of Section 8(a)(1) and (5) of the Act, the Respondent shall cease and desist from dealing directly with employees, making unilateral changes and refusing to recognize and bargain with the Union. Further, the Respondent shall make whole its employees for any loss of pay or other benefits they may have suffered as a result to such unlawful conduct, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also reimburse its unit employees for any expenses ensuing from the Respondent's unlawful failure to make the required benefit payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, supra. The Respondent shall also remit all fringe benefit amounts which have become due. Any additional amounts due the employee benefit funds shall be as prescribed in *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979). See *Hilton's Environmental*, 320 NLRB 437, 439 (1995).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, James Heavy Equipment Specialists, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union sympathies and opinions of Respondent's proposed benefit plans.

(b) Threatening employees that the Respondent would cease business because of their union representation.

(c) Threatening employees that the Respondent no longer recognized the Union as their collective-bargaining representative and that they would only receive benefits determined by the Respondent.

(d) Coercively accosting union representatives in the presence of employees.

(e) Sponsoring, initiating, and paying for efforts to get employees to renounce the Union as their collective-bargaining representative.

(f) Constructively discharging Michael Cardenas.

(g) Bypassing the Union and dealing directly with unit employees.

(h) Unilaterally implementing changes in terms and conditions of employment of unit employees.

(i) Withdrawing recognition from, and refusing to meet and bargain with, the Union as the exclusive bargaining representative of the unit employees.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(j) Ceasing to pay employee benefit funds as required by the expired collective-bargaining contract with the Union.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Michael Cardenas full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Michael Cardenas whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful constructive discharge of Michael Cardenas, and within 3 days thereafter notify the employee in writing that this has been done and that the constructive discharge will not be used against him in any way.

(d) Make whole unit employees for any loss they may have incurred as a result of the unilateral changes made as set forth in the remedy section.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days from the date of this Order, notify, in writing, the Union that the Respondent rescinds its withdrawal of recognition from the Union, that the Respondent recognizes the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit and that, at the Union's request, the Respondent will rescind all or any part of the benefits package, bonus program or other changes it unilaterally implemented.

(g) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time maintenance, service and parts employees employed by the Respondent at its 2150A South Valentia Street, Denver, Colorado, location, excluding all other employees, professional employees, guards and supervisors as defined in the Act.

(h) Within 14 days after service by the Region, post at its facility in Denver, Colorado, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 16, 1996.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(j) Pay to the appropriate contract benefit funds the contributions required to the extent that such contributions have not been made or that the employees have not otherwise been made whole for their ensuing medical and other expenses, and continue such payments until Respondent negotiates in good faith with the Union to an agreement, or to good-faith impasse, or until the Union refuses to bargain.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."